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August 12, 2016

VIA U.S. MAIL AND EMAIL

(jjordan@fec.gov & mdebau@fcc.gov)

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2016 AUG 16 PM 2:53

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COMMISSION

RE: MUR 7110, Mitchell Berger's Complaint

Dear Mr. Jordan:

We represent Tim Canova and Tim Canova for Congress.

This correspondence shall serve as a response to the letter submitted by Mitchell W. Berger which contained a Complaint under 52 U.S.C. § 30109(a)(1). The Complaint makes various allegations concerning Tim Canova, individually, and Tim Canova for Congress. Mr. Berger fails to identify himself as counsel for anyone, including Mr. Canova's primary opponent Debbie Wasserman Schultz. Nevertheless, although unstated, it would appear that Mr. Berger represents Debbie Wasserman Schultz in some manner, whether individually, or her campaign, her Super PAC, or some other entity relating to her present re-election campaign.

Significantly, the Complaint contains a number of statements and allegations that are outside of the Federal Elections Commission's jurisdiction, which even if true (and they are not) could not be decided by the Commission, and the Complaint also fails to provide sufficient information with regard to the claims asserted that are within the Commission's jurisdiction. Mr. Berger's Complaint fails in one of the most fundamental, threshold requirements – it does not delineate as to what information is alleged from his own personal knowledge and what emanates from information that he then specifies. And the reason is clear. Mr. Berger makes accusations as to certain web ads of the Canova campaign, without any evidence that they actually ran on broadcast television. This Complaint is nothing more than an abusive attempt by Mr. Berger to support the candidacy of Wasserman Schultz by creating vexatious litigation for the Canova

campaign on the basis of misleading, non-substantive and de minimis matters. The Commission should not condone Mr. Berger's frivolous Complaint filed with such an improper purpose.

A. Factual Background

The Berger Complaint includes a link to a Politico article that links to two web videos of Tim Canova for Congress¹. The web videos do not have the "for broadcast" disclaimers (as is appropriate). The complaint states: "At the time of this writing, these ads continue to run on television stations throughout Florida's 23rd Congressional District." There is no attribution to this statement. The complainant does not state whether this statement is based on Mr. Berger's personal knowledge nor is there any back up information supplied with this claim, the statement is made without any support whatsoever. Accordingly, this claim should not be considered by the FEC. Mr. Berger has the burden of establishing the source of knowledge that supports factual allegations in his complaint and has failed to do so. Therefore the Complaint should be dismissed.

The Complaint claims that the four second disclaimer at the end of the communication identifying Mr. Canova as having paid for and approved the ad is not present. Mr. Berger provides no information or sworn statement to establish that the web ads in the links were actually broadcast on television.

Mr. Berger makes a host of untrue statements and claims against Mr. Canova that have nothing to do with the FEC. He claims that Mr. Canova's campaign violated 47 U.S.C. § 315(b)(2), this is outside of the FEC's jurisdiction and is similarly denied. Mr. Berger claims that the re-broadcast of a news clip violated the Rules of the U.S. House. This is incorrect. Mr. Berger makes personally disparaging comments about Mr. Canova's and his campaign's "willingness to advance their campaign without regard for the law." All of these statements should be stricken as unsupported and insupportable surplusage and should not be considered by the Commission.

The web ads referenced by Mr. Berger do have a statement on camera by Mr. Canova stating that he paid for and approved the ad. The ads do identify Tim Canova for Congress as having paid for the ads. They identify Tim Canova for Congress as the entity who has sponsored the ad. There is no harm nor is the public deceived by the ad in question.

B. Legal Analysis

While the complaint is signed and sworn to by Mr. Berger, he fails to delineate what information contained therein is based upon his personal knowledge and what information is based on other sources of information. According to the Federal Election Commission's "Filing a Complaint" brochure² a complainant, "**must** differentiate between statements based on the

¹ See Elena Schneider, Gardner, Tillis Plot NRSC Co-chairmanship, POLITICO Morning Score, July 11, 2016, <http://www.politico.com/tipsheets/morning-score/2016/07gardner-tillis-plot-nrsc-co-chairmanship-215245>.

² <http://www.fec.gov/pages/brochures/complain.shtml>

complainant's personal knowledge and those based on information and belief. Statements not based on personal knowledge should identify the source of the information." (emphasis added)

The FEC regularly dismisses claims because of a lack of evidence supporting the allegation and the de minimis nature of the alleged violation. MUR 6831 is a good example. That complaint, filed against Tom MacArthur, Tom MacArthur for Congress, and Ronald Gravino, in his official capacity as treasurer (Committee) alleged that a television advertisement aired by MacArthur failed to contain a written statement of approval by the candidate. The Commission exercised its prosecutorial discretion and dismissed the matter. The Commission observed that the advertisement at issue contained identifying information sufficient to indicate that MacArthur and the Committee authorized it.³

Here, the Complaint links to two web ads that have appropriate disclaimers. There is no evidence presented that the web ads actually ran on television. And in any event, there is no question that the web ads contain identifying information sufficient to indicate that Tim Canova and Tim Canova for Congress paid for and approved the advertisement. Regardless, Mr. Berger has utterly failed to meet his burden and, therefore, the Complaint should be dismissed.

CONCLUSION

The Complaint should be dismissed for failure to properly state a cause of action. Further, if the Complaint is considered, there is no evidence that the web ads actually ran on broadcast television. Accordingly, the Commission should reach the determination that there is "no reason to believe" a violation has occurred as these allegations fail to give rise to a reasonable inference that a violation has occurred, as the web ads cited have the proper disclaimers. Further, the alleged violation – even if true – is so de minimis that the FEC should exercise its prosecutorial discretion and dismiss this matter.

Sincerely,


Frank P. Rainer

FPR
Enclosure

³ See attached as Exhibit 1, the Federal Election Commission Weekly Digest released on July 29, 2016.